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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

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8
9 Case No. 2:14-cv-00094-RFB-NJK

10 **OPINION & ORDER**

11 Defendants' Motion for Summary Judgment
12 (ECF No. 67)

13 MICHAEL FOLEY,

14 Plaintiff,

15 v.

16 LOREA AROSTEGUI, *et al.*,

17 Defendants.

18 **I. INTRODUCTION**

19 Before the Court is Defendants' Motion for Summary Judgment. ECF No. 67. For the
20 reasons stated below, the motion is granted in part and denied in part.

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22 **II. PROCEDURAL BACKGROUND**

23 On March 10, 2014, Plaintiff Michael Foley filed a civil rights lawsuit against Clark
24 County and Lorea Arostegui, Georgina Stuart, Deborah Croshaw, Lisa Reese, and Lisa Ruiz-Lee,
25 all of whom are Clark County Family Services employees. ECF No. 5. 2. Plaintiff alleged the
26 following causes of action: (1) First Amendment claim regarding the right to petition the
27 government for redress of grievances; (2) Fourth Amendment claim arising from an unlawful
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1 search and seizure; (3) Due Process and Equal Protection claims under the Fifth and Fourteenth
2 Amendments; (4) Conspiracy to Violate the Right to Life, Liberty, Property, Due Process and
3 Equal Protection of the Laws; and (5) Intentional Infliction of Emotional Distress. Defendants filed
4 a Motion to Dismiss the Amended Complaint on January 20, 2014. ECF No. 28. At a hearing
5 September 21, 2015, the Court dismissed all of Plaintiff's claims without prejudice, with the
6 exception of the Due Process and First Amendment retaliation claims. ECF No. 42. At a hearing
7 on August 24, 2016, the Court ordered Plaintiff to file his Second Amended Complaint, which was
8 filed on September 2, 2016. ECF No. 62. The Second Amended Complaint includes all of the
9 claims brought in the First Amended Complaint. Id. Defendants filed the instant Motion for
10 Summary Judgment on January 3, 2017. ECF No. 67. Plaintiff filed a Response and a Motion for
11 Pro Bono Counsel on January 24, 2017. ECF Nos. 69, 70. Defendants filed a Reply on February
12 3, 2017. ECF No. 71.

13 14 15 16 17 **III. LEGAL STANDARD**

18 **A. Motion for Summary Judgment**

19 Summary judgment is appropriate when the pleadings, depositions, answers to
20 interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no
21 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."
22 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering
23 the propriety of summary judgment, the court views all facts and draws all inferences in the light
24 most favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir.
25 2014). If the movant has carried its burden, the non-moving party "must do more than simply show
26 that there is some metaphysical doubt as to the material facts . . . Where the record taken as a
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1 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
2 issue for trial.” Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original) (internal quotation
3 marks omitted).

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5 When a litigant is pro se, “we must consider as evidence in his opposition to summary
6 judgment all of [his] contentions offered in motions and pleadings, where such contentions are
7 based on personal knowledge and set forth facts that would be admissible in evidence, and where
8 [he] attested under penalty of perjury that the contents of the motions or pleadings are true and
9 correct.” Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004). The Ninth Circuit has held that a
10 verified complaint may serve as an opposing affidavit under Rule 56. Schroeder v. McDonald, 55
11 F.3d 454, 460 (9th Cir. 1995). To function as an opposing affidavit, the verified complaint must
12 be based on personal knowledge and set forth specific facts admissible in evidence. Id. The
13 allegations cannot be “based purely on [a litigant’s] belief.” Id.

14 15 16 **IV. UNDISPUTED FACTS**

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18 As a preliminary matter, the Court notes that the Defendants failed to include an
19 authenticating declaration with their Motion for Summary Judgment. They included an
20 authenticating declaration with their Reply brief, however, and so the Court will consider the
21 exhibits submitted with their Motion for Summary Judgment. Additionally, Plaintiff’s Response
22 declines to provide a statement of facts. However, the Court considers allegations in pleadings of
23 which the pro se plaintiff would have personal knowledge. Jones, 393 F.3d at 923. Based on the
24 record, the Court finds the following relevant facts to be undisputed.

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26 On November 4, 2011, Plaintiff filed a civil rights suit naming his ex-wife, Patricia Foley,
27 and Defendant Georgina Stuart as defendants, among others. Patricia Foley was served on
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1 December 11, 2011 and answered on January 12, 2012. Defendant Stuart was served on January
2 31, 2012. On January 23, 2012, Defendant Arostegui opened an investigation into possible mental
3 abuse of Plaintiff's daughter, TMF.

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5 On March 20, 2012, Defendants sent a letter to Plaintiff's last known address stating the
6 following:

7 On January 23, 2012, the Clark County Department of Family Services, Child
8 Protective Services, received a report alleging Mental Injury of [TMF]. Based upon
9 the Division's investigation of the report, it has been determined there is credible
10 evidence that Mental Injury as defined in NRS 432.B has occurred and has been
11 substantiated.

12 Pursuant to NRS 432.B.310, the Division is required to submit identifying data to
13 the State Central Registry for each investigation substantiated for abuse or neglect
14 of a child.

15 If you have any questions about your case, please contact me at [number redacted]
16 Attached is the process you must follow in order to appeal the child maltreatment
17 finding.

18 ECF No. 67-A. The letter was signed by Defendant Arostegui as a case manager in the Child
19 Protective Services Division and included an attachment explaining the steps to take in order to
20 pursue an Agency Appeal and/or a Fair Hearing. The attachment indicates that "[t]he purpose of
21 these hearings is not to re-investigate the allegations, but to ensure the appropriateness of
22 substantiated decision." *Id.* (emphasis in original).

23 Defendants do not have any record of a response to the letter. In August 2012, Plaintiff
24 "discovered that the defendants' abuse investigation continued and was closed in or about March
25 2012 as 'substantiated,' and that his name was entered into the Registry." Plaintiff did not attempt
26 to appeal for several years. Defendant Clark County conducted a search to locate Plaintiff's last
27 known address and again contacted Plaintiff by letters, dated October 7, 2015, and October 28,
28 2015, notifying him that it had been determined that there is credible evidence of mental injury,
and providing him with information as to how to "appeal the child maltreatment finding."

1 Defendants have no records of responses to these letters.

2 Plaintiff “has been substantially hindered and disabled from applying for jobs and positions
3 that he is capable of having, but would be surely denied due to the fact that his name would be
4 found by any prospective employer in the registry.” Plaintiff also has been “chilled” from seeking
5 reemployment with his former employer, Cox Communications, “because they conduct
6 comprehensive background checks.”
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8 **V. DISCUSSION**

9 **A. Due Process Violation**

10 ***1. Legal Standard***

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12 Whether a law amounts to a violation of procedural due process rights requires a two-step
13 inquiry: “the first asks whether there exists a liberty or property interest which has been interfered
14 with by the State; the second examines whether the procedures attendant upon that deprivation
15 were constitutionally sufficient.” Ky. Dep’t of Corrs. v. Thompson, 490 U.S. 454, 460 (1989)
16 (internal citations omitted).
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18 ***i. Protected Right***

19 The Fourteenth Amendment protects against “the deprivation of property or liberty without
20 procedural due process.” Brady v. Gebbie, 859 F.2d 1543, 1547-48 (9th Cir. 1988). The Supreme
21 Court has held that “Where a person's good name, reputation, honor, or integrity is at stake because
22 of what the government is doing to him, notice and an opportunity to be heard are essential.”
23 Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). The Ninth Circuit applies a “stigma plus”
24 test when deciding whether a protected liberty interest exists. “While stigma alone is inadequate
25 to affect a liberty interest, stigma plus an alteration in legal status can encroach on a cognizable
26 liberty interest.” Am. Civil Liberties Union of Nevada v. Mastro, 670 F.3d 1046, 1058 (9th Cir.
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1 2012). For example, in Neal v. Shimoda, 131 F.3d 818, 830 (9th Cir. 1997), the Ninth Circuit
2 found that inmates have a protected liberty interest at stake in the determination of their status as
3 sex offenders, which stems from the stigmatizing consequences of being labeled a sex offender, in
4 addition to “the subjection of the targeted inmate to a mandatory treatment program whose
5 successful completion is a precondition for parole eligibility.” Id.

7 In the case of being listed in a child abuse registry, the Ninth Circuit has held that such a
8 classification is “unquestionably stigmatizing.” “We have observed that there is ‘[n]o doubt ... that
9 being falsely named as a suspected child abuser on an official government index is
10 defamatory.’ ... The horror deepens when such abuse occurs at the hands of the parents, who have
11 an obligation to protect their children.” Humphries v. Cnty. of Los Angeles, 554 F.3d 1170, 1186
12 (9th Cir. 2009), as amended (Jan. 30, 2009), rev'd and remanded sub nom. Los Angeles Cnty., Cal.
13 v. Humphries, 562 U.S. 29 (2010) (internal citation omitted). While the Supreme Court later
14 reversed the Ninth Circuit’s decision regarding an aspect of the Monell claim, the Circuit’s
15 language regarding the registry remains. See Los Angeles Cnty., Cal. v. Humphries, 562 U.S. 29,
16 39 (2010). In Humphries, the Ninth Circuit found that the Plaintiff had satisfied the “stigma-plus”
17 test by alleging that, beyond the stigma of being labeled a child abuser, the statute also implicated
18 his legal status by: (1) mandating that licensing agencies search the registry and conduct an
19 additional investigation prior to granting a number of rights and benefits, and (2) making
20 information in the registry available to other identified agencies including persons making pre-
21 employment investigations and out-of-state agencies making foster care or adoptive decisions.
22 Humphries, 554 F.3d at 1188.

26 *ii. What Process is Due*

1 Once a protected property or liberty interest has been established, the process that must be
2 followed before that interest can be taken away depends on three factors: “First, the private interest
3 that will be affected by the official action; second, the risk of an erroneous deprivation of such
4 interest through the procedures used, and the probable value, if any, of additional or substitute
5 procedural safeguards; and finally, the Government's interest, including the function involved and
6 the fiscal and administrative burdens that the additional or substitute procedural requirement would
7 entail.” Matthews v. Eldridge, 424 U.S. 319, 335 (1976). The fundamental requirement of due
8 process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” Id. at
9 335. “Ordinarily, due process of law requires an opportunity for ‘some kind of hearing’ prior to
10 the deprivation of a significant property interest.” Samson v. City of Bainbridge Island, 683 F.3d
11 1051, 1059 (9th Cir. 2012) (internal citations omitted). “In situations where the State feasibly can
12 provide a predeprivation hearing before taking property, it generally must do so regardless of the
13 adequacy of a postdeprivation tort remedy to compensate for the taking. Conversely, in situations
14 where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake,
15 or where the State is truly unable to anticipate and prevent a random deprivation of a liberty
16 interest, postdeprivation remedies might satisfy due process.” Zinermon v. Burch, 494 U.S. 113,
17 132 (1990) (internal citations omitted).

21 **2. Discussion**

22 Plaintiff alleges in his Second Amended Complaint that “by unlawfully seizing and
23 interrogating Plaintiff’s children, and conspiring to do the same as Federal and State Actors, under
24 false pretenses... and taking adverse action against the Plaintiff without providing adequate notice
25 or an opportunity to be heard or deny consent, the defendants ... violated Plaintiff’s procedural
26 due process rights.” Thus, Plaintiff’s Second Amended Complaint is best construed as asserting
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1 two due process claims: (1) based upon the seizure and examination or interrogation of his
2 children, and (2) based on his entry into the abuse registry.

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4 In the oral ruling on the Motion to Dismiss, the Court dismissed the Fourth and Fourteenth
5 Amendment claims based on the “seizure” of Plaintiff’s children. The Court affirms and clarifies
6 that ruling. Plaintiff’s Complaint alleges that during the school interrogation, Defendant Arostegui
7 noted that TMF lives with her mother, who has “full custody.” No pleading or admissible fact
8 indicates that Foley had custody over his children at the time of the relevant “seizures.” The Court
9 further reiterates that Plaintiff has presented no admissible facts beyond those in the pleadings of
10 which he would have personal knowledge. Plaintiff in effect asks that the Court find some evidence
11 for the claim based on the non-specific hearsay allegations that his children, over whom he may
12 not have had custody—according to his own allegation in the SAC—were seized, interrogated,
13 and examined. The Court finds that the Plaintiff has failed to raise a genuine dispute of material
14 fact with respect to the first due process claim.
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17 Regarding the claim based upon his entry into the registry, Plaintiff’s statements raise a
18 genuine dispute. Plaintiff’s allegations implicate a liberty interest similar to the one articulated by
19 the Ninth Circuit in Humphries. Besides the potential stigma of being labeled a child abuser, the
20 statute in this case similarly makes the information on the registry available in limited
21 circumstances, including for background checks of prospective employees (with the written
22 authorization of the subject of the background investigation), to obtain a license for operating a
23 childcare facility, and to provide the information to “an employee or contractor of any other state
24 or local governmental agency responsible for the welfare of children who requests access to the
25 information and who demonstrates to the satisfaction of the Administrator a bona fide need to
26 access the information.” NRS 432.100(3). The Plaintiff has alleged that his listing on the registry
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1 has prevented him from seeking certain employment opportunities, including seeking
2 reemployment with his former employer, Cox Communications, because he knows that he would
3 be required to authorize a comprehensive background check in order to obtain employment. Thus,
4 the Court finds that being listed on the statewide child abuse registry implicates a liberty interest
5 that satisfies the stigma-plus test.
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7 Having established that being listed on the registry implicates a protected liberty interest,
8 the question is how much process is due before a reporting agency can list an individual on the
9 registry. The case at hand raises procedural issues beyond those considered by the Ninth Circuit
10 in the past. In Humphries, the Ninth Circuit held that the statewide child abuse registry statute
11 violated procedural due process because it did not include a procedure by which an individual
12 could challenge their listing on the registry. Humphries, 554 F.3d at 1176. That is not the case
13 here. The Nevada statute provides a mechanism for appeal that the Defendants informed Plaintiff
14 of in the same letter in which they informed him that they had made the determination to add him
15 to the registry. The Court does not find that the Plaintiff has raised a genuine dispute regarding the
16 timeliness of the Defendants providing him with notice of his right to appeal.
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18 The question here, which the Ninth Circuit did not address in Humphries, is whether the
19 Defendants should have provided Plaintiff with notice and the opportunity to be heard after
20 concluding that the allegations against him were substantiated, but before adding him to the
21 registry. “In situations where the State feasibly can provide a predeprivation hearing before taking
22 property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to
23 compensate for the taking.” Zinermon, 484 U.S. at 132. Where there is a protected liberty interest
24 at stake, the State is required to hold a predeprivation hearing unless it would be “unduly
25 burdensome.” Id. The Defendants have not provided any reasons in their pleadings or motions why
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1 providing a predeprivation proceeding in this case would be unduly burdensome. Defendants only
2 argument on this matter is that “Plaintiff has had multiple opportunities and several years to avail
3 himself and appeal his name being placed in the Registry. In fact, Plaintiff does not deny that he
4 ever requested a hearing before a Hearing Officer, as was his right under state law procedures.
5 Having failed to avail himself of the available procedures that may have rectified the alleged
6 deprivation, he cannot now claim to have been deprived of the process that he chose not to seek.”
7 This argument regarding Plaintiff’s decision not to avail himself of postdeprivation remedies,
8 while potentially relevant to the question of damages, is irrelevant to the question of whether the
9 Defendants should have offered a *predeprivation* hearing. The law is clear that the State must
10 provide a predeprivation remedy where feasible, regardless of the ability to cure a deprivation after
11 the fact. Therefore, the Court finds that Plaintiff has raised a genuine question of material fact
12 regarding whether it would have been feasible for the Defendants to offer him notice and the
13 opportunity to be heard before adding his name to the registry.
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17 The Court finds, however, that Plaintiff has not provided sufficient evidence of personal
18 participation by the individual Defendants to raise a genuine question of material fact. Therefore,
19 the Court will grant summary judgment on the due process claim against the individual
20 Defendants.

21 The Court finds that there is a genuine dispute regarding the liability of Defendant Clark
22 County, however. “When an individual sues a local government for violation of a constitutional
23 right, the municipality is liable if the individual can establish that the local government ‘had a
24 deliberate policy, custom, or practice that was the ‘moving force’ behind the constitutional
25 violation he suffered.’” Galen v. County of L.A., 477 F.3d 652, 667 (9th Cir. 2007) (quoting
26 Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694–95 (1978)). When it comes to a local
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1 municipality implementing a statewide statute, the question of Monell liability becomes more
2 difficult. This is because “municipal liability under § 1983 attaches where -- and only where -- a
3 deliberate choice to follow a course of action is made from among various alternatives by the
4 official or officials responsible for establishing final policy with respect to the subject matter in
5 question.” Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986).
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7 The Ninth Circuit held that Monell liability was possible based on similar facts in
8 Humphries, however. In that case, the local municipality was similarly tasked with implementing
9 a statewide child abuse registry statute that did not require sufficient due process be given to the
10 accused. In considering whether the local municipality could be held liable for implementing the
11 state statute, the Ninth Circuit held, “[The state-wide child abuse registry statute] itself did not
12 create a sufficient procedure by which the Humphries could challenge their listing on the Index.
13 Nothing in [the statute], however, prevented the LASD from creating an independent procedure
14 that would allow the Humphries to challenge their listing on the Index. By failing to do so, it is
15 possible that the LASD adopted a custom and policy that violated the Humphries' constitutional
16 rights.” Humphries, 554 F.3d at 1202. The Ninth Circuit then reversed and remanded to the district
17 court to determine the county’s liability under Monell. Id. The issue in this case is very similar.
18 Although the statewide statute does not mandate any predeprivation hearing, nothing in the statute
19 prevents local reporting agencies from implementing those procedures themselves. Therefore,
20 there is a genuine dispute concerning whether, by failing to implement its own procedures,
21 Defendant Clark County made “a deliberate choice to follow a course of action... from among
22 various alternatives.” Pembaur, 475 U.S. at 483. Because of this, the Court will not grant summary
23 judgment to Defendant Clark County on the due process claim.
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28 **B. First Amendment Retaliation Claim**

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1 However, the Defendants do not deny that Defendant Stuart was served on January 31, 2012, that
2 they opened their investigation of Plaintiff in January of 2012, or that they had substantiated the
3 allegations of abuse and forwarded Plaintiff's information to the registry by March 20, 2012. "A
4 plaintiff may establish motive using direct or circumstantial evidence...In cases involving First
5 Amendment retaliation in the employment context, we have held that a plaintiff may rely on
6 evidence of temporal proximity between the protected activity and alleged retaliatory conduct to
7 demonstrate that the defendant's purported reasons for its conduct are pretextual or false." Id. at
8 980. The same rationale applies here. Even without further evidence, the close proximity of these
9 events is sufficient to establish "a nexus between the defendant's actions and an intent to chill
10 speech." Ariz. Students' Ass'n, 824 F.3d at 867.

13 The Defendants could have rebutted this presumption by submitting evidence indicating
14 that they would have decided to pursue this investigation and substantiate these allegations in the
15 absence of Plaintiff filing the civil rights lawsuit. The Defendants declined to submit such
16 evidence, however. Instead they argue, "Plaintiff has not made a case out of retaliation because
17 he has not shown that the impairments he suffered were not imposed independently under
18 legitimate non-retaliatory rationales." This assertion misstates the burden at this stage in the
19 analysis. Once Plaintiff established a nexus between the Defendants' actions and the intent to
20 chill speech, the burden was on the Defendants to prove that they would have come to the same
21 conclusions otherwise. Because the Defendants have submitted no such evidence, the Court finds
22 a material dispute with regard to the issue of retaliatory motivation.

25 Plaintiff alleges in his Second Amended Complaint that each of the individual
26 Defendants "knowingly and/or recklessly engag[ed], endors[ed] and allow[ed] a false and
27 unwarranted investigation to be conducted and carried out against the Plaintiff, knowing that said
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1 investigation was at the request and behest of Defendant Georgina Stuart, and in retaliation
2 against the Plaintiff for having petitioned the government (the U.S. District Court) for redress of
3 his grievances against County government defendant Stuart in the civil action Michael Foley v.
4 Michelle Pont et al, Case No. 2:11-cv-01768-JCM-(VCF).” However, Plaintiff does not have
5 personal knowledge of the actions or motives of most of the individual Defendants sufficient to
6 establish a material dispute regarding their personal participation in the alleged retaliation.
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9 The only individual Defendant that Plaintiff has pled personal knowledge of is Defendant
10 Arostegui. Plaintiff alleges in his Second Amended Complaint that Defendant Arostegui
11 contacted him in January of 2012 and “attempted to persuade him to implicate himself, and
12 admit to their allegations that he ‘mentally injured’ his daughter TMF.” He further alleges that he
13 “informed Arostegui that he was proceeding with a civil rights complaint against her fellow
14 agent/investigator/defendant Georgina Stuart, and asked whether she was conducting the
15 investigation in retaliation for his filing of the Federal (Pont) lawsuit,” which Defendant
16 Arostegui did not deny. The Court will consider these allegations, as Plaintiff would have
17 personal knowledge of them. Additionally, Defendant Arostegui signed the letter, submitted and
18 authenticated by the Defendants, informing Plaintiff of the substantiation of the allegations
19 against him and the decision to forward his information to the registry, along with his right to
20 appeal that decision. These facts, in combination with the potentially suspicious timing of the
21 investigation, are sufficient to establish a material dispute regarding Defendant Arostegui’s
22 involvement in the alleged retaliation. The Court will grant summary judgment on the First
23 Amendment retaliation claim against all other individual Defendants. Additionally, Plaintiff has
24 submitted no evidence based on personal knowledge to establish a policy or custom of retaliation
25 that would make Defendant Clark County liable under any of the four Monell theories, and so
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1 the Court will grant summary judgment to Defendant Clark County on the First Amendment
2 retaliation claim.

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4 **C. Previously Dismissed Claims**

5 The Court previously dismissed Plaintiff's other claims for failure to state a claim, but
6 allowed Plaintiff leave to amend his complaint with additional information. Plaintiff included
7 these claims again in his Second Amended Complaint. Having reviewed the pleadings, the Court
8 finds that the Plaintiff has failed to establish any of the previously dismissed claims, and so the
9 Court will dismiss them with prejudice at this time.

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11 **VI. CONCLUSION**

12 Accordingly,

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14 **IT IS HEREBY ORDERED** that Defendants' Motion for Summary Judgment (ECF No.
15 67) is GRANTED IN PART and DENIED IN PART as follows:

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- 17 • Summary judgment is denied as to Plaintiff's due process claim against Defendant
18 Clark County.
 - 19 • Summary judgment is denied as to Plaintiff's First Amendment retaliation claim
20 against Defendant Arostegui.
 - 21 • Summary judgment is granted for the defendants as to every other claim.

22 **IT IS FURTHER ORDERED** that a status conference is set for February 12, 2018 at
23 3:00 p.m. in Courtroom 7D to review this Order and discuss a potential trial.

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26 DATED: January 31, 2018.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE